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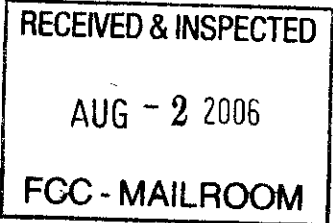
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July 20, 2006



Ex Parte Filing

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

ORIGINAL

Re: *Pay Telephone Reclassification and Compensation Provisions of
the Telecommunications Act of 1996, CC Docket 96-128*

Dear Ms. Dortch:

Enclosed please find a hard copy of an attachment filed with AT&T, BellSouth and Verizon's Ex Parte letter on July 19, 2006. There was a problem uploading the .pdf of this document to the FCC's ECF website during filing. Please contact me with any questions regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Angela L. Oncken".

Angela L. Oncken
Assistant to Aaron M. Panner

Enc.

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governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, *the judgment of the rendering State gains nationwide force.*" *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (emphasis added; footnote omitted); *see also Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 125 F.3d 18, 20-21 (1st Cir. 1997) (Boudin, J.). Furthermore, all of the arguments that the independent payphone providers seek to raise before the Commission were necessarily rejected by the responsible state tribunals.

Independent payphone providers have argued that *res judicata* does not bar their claim for two reasons. *First*, they argue that, because they claim that federal law preempts state law, *res judicata* is inapplicable. That assertion is incorrect. In their state court review proceeding, independent payphone providers have been free to argue (and they have in fact argued) that their refund claims were based on binding federal law.³ The state court is fully competent to apply and bound to follow federal law. *Testa v. Katt*, 330 U.S. 386 (1947). As noted above, there is no dispute that state courts have jurisdiction over those federal claims. Indeed, the payphone providers initiated state court review to have the state court exercise jurisdiction over their claims. Thus, the state court's judgment that payphone providers had no right to a refund under federal law is preclusive. *See, e.g., Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1243-44 (9th Cir. 2004) ("It is well settled that claim and issue preclusion apply to state court rulings on federal preemption issues."), *cert. denied*, 544 U.S. 1049 (2005); *Town of Deerfield v. FCC*, 992 F.2d 420, 429 (2d Cir. 1993) (holding that New York court, in Article 78 proceeding, "had the power to decide the preemption issue, for federal courts have not been given exclusive jurisdiction over such questions"); *id.* at 425 (approving district court holding that "even if the state court erred, that does not mean that this court can disregard the preclusive effect of the prior state court proceeding," even in face of preemption claim) (citation and internal quotation marks omitted); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 455 (7th Cir. 1990) (Easterbrook, J.) (preemption claim barred where it could have been raised in prior state court action).

Payphone providers rely in support of their argument on the Tenth Circuit's decision in *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001).⁴ In that

³ *See, e.g.,* Comments of BellSouth Telecommunications, Inc., *et al.* on Independent Payphone Association of New York's Petition for an Order of Preemption and Declaratory Ruling, Docket No. 96-128, at 10-11 (filed Jan. 18, 2005); Comments of BellSouth Telecommunications, Inc., *et al.* on Illinois Public Telecommunications Association's Petition for Declaratory Ruling, Docket No. 96-128, at 8 (filed Aug. 26, 2004).

⁴ Payphone providers have also cited the Eighth Circuit's decision in *Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004). That case stands for the proposition that, under Sections 251 and 252, a state commission interpretation of obligations under Section 251 is not entitled to preclusive effect until reviewed by a federal district court. *See id.* at 692-94. That holding has no application here, where the FCC has specifically determined that basic payphone

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² The Florida Public Telecommunications Association – while conceding that the res judicata effect of the Florida Public Service Commission (“PSC”) decision is governed by state law, *see* Reply Comments of the Florida Public Telecommunications Association, Inc. at 9 (filed Mar. 10,

$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

Under these circumstances, the payphone providers cannot continue to pursue a claim for refunds. “A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.” *Montana v. United States*, 440 U.S. 147, 153 (1979) (internal quotation marks omitted) (alteration in original). “Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Id.* (citations omitted).

The doctrine of res judicata or claim preclusion provides that, “as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.” *Gramatan Home Investors Corp. v. Lopez*, 386 N.E.2d 1328, 1331 (N.Y. 1979); *see also State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003); *Northeast Illinois Reg’l Commuter R. Corp. v. Chicago Union Station Co.*, 832 N.E. 2d 214, 217 (Ill. App. Ct. 2005). The bar applies to all “matters that could have or should have been raised in a prior proceeding.” *Board of Managers v. Horn*, 651 N.Y.S.2d 326, 327 (App. Div. 1996) (citing *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 749 (N.Y. 1981)); *see also Topps v. State*, 865 So. 2d 1253, 1255-56 (Fla. 2004); *Northeast Illinois, supra*.

All the requirements for application of res judicata (and for collateral estoppel) are met here. The independent payphone providers were parties to the earlier litigation, they are pursuing precisely the same claims that were rejected by the state tribunal – that is, for refunds of amounts paid under pre-existing state tariffs – and the state courts had jurisdiction over the claims, including the federal claims. As the Supreme Court has said, a “final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons

2006) – argues that the Florida PSC decision at issue here would not bar subsequent litigation under state law. But the FPTA cannot distinguish the cases that we cited in our comments on their petition (filed Feb. 28, 2006), and the sole case they cite – *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984) cannot help it. In *Albrecht*, the Florida Supreme Court held that a reverse condemnation claim is not the same cause of action as an action for judicial review of the agency action leading to the alleged taking, and that a petitioner therefore has no obligation to bring a reverse condemnation action along with an action for judicial review. The Florida court therefore ruled that an unsuccessful challenge to the legality of agency action does not bar a subsequent action claiming that the action constitutes a taking for which just compensation is required. *See id.* at 12 (“Neither the doctrine of res judicata nor estoppel by judgment apply to this case because the second cause of action is not the same as the first and the issues now presented were not actually litigated in the previous proceedings.”). Here, by contrast, the cause of action and issue presented are precisely the same as those litigated before the Florida PSC.

case, airlines filed complaints with the FAA claiming that petitioner had improperly banned scheduled passenger service in violation of federal law and assurances made to qualify for discretionary grants from the FAA. While those complaints were pending, petitioner sought and obtained a permanent injunction against the airlines, which was upheld by the Colorado Supreme Court. Despite the existence of that judgment, the FAA granted the complaints. The Tenth Circuit held that the state court determination did not need to be accorded collateral estoppel effect because the FAA “was not a party to . . . the state court proceedings” and its “interest in fulfilling its statutory responsibility to ensure airport compliance with federal aviation laws and grant assurances, and to protect the public interest is obviously independent of the interests of any particular air carrier.” 242 F.3d at 1219-20.⁵

By contrast, here, the Commission specifically decided that states, not the Commission, would be responsible for implementing federal regulations governing the pricing of payphone lines. See Memorandum Opinion and Order, *Wisconsin Public Service Commission*, 17 FCC Rcd 2051, 2056, ¶ 15 (2002) (“In the interest of federal-state comity, we stated that we would rely initially on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276.”); *id.* at 2071, ¶ 66 (after clarifying federal standard, refusing to evaluate Wisconsin state payphone line rates). In so doing, the Commission necessarily understood that state commissions, in exercising this responsibility, would reach determinations that would become final and binding. It would be fundamentally inconsistent with the Commission’s allocation of responsibility to the states to permit collateral attack on a final state judgment.

This case thus strongly resembles *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), in which the court held that the EPA was estopped from relitigating, in a federal enforcement action, an issue that was already decided in a state enforcement action. The court noted that both federal and state governments had enforcement authority under the statute and that state enforcement authority “is revocable by the EPA.” *Id.* at 1002. Precisely for that reason, the court ruled that it would be inappropriate to fail to respect the res judicata effect of a state-court judgment: “[i]f the EPA is dissatisfied with state enforcement efforts or the lack thereof it can revoke permit-issuing authority or bring an independent action in federal court.” *Id.* But “[w]here, as here, a state court has entered a final judgment on an identical issue” the

lines are to remain tarified in the state jurisdiction, with state commissions responsible for application of federal pricing rules, and with review provided through the ordinary process of state-authorized judicial review.

⁵ While the Tenth Circuit stated that this amounted to declining to “extend[] full faith and credit” to the state court judgment, this mischaracterized the court’s decision. As the court noted, “the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under . . . Colorado law.” *Id.* at 1220 (emphasis added). Full-faith-and-credit principles do not require affording a judgment any greater preclusive effect than it would have under state law.

EPA could not invoke the federal statute “to avoid any preclusive effect that the judgment may have.” *Id.*

Second, independent payphone providers have argued that the Commission is not bound by prior state court judgments because it was not a party to them. As an initial matter, the fact that the payphone providers are estopped is enough: *they* cannot be permitted to pursue a claim that they have already litigated to final judgment in state tribunals. But, in any event, the argument misstates the law. The payphone providers ask the Commission to act in a purely adjudicatory capacity by declaring that payphone providers have a right to a refund of amounts previously paid under state payphone line tariffs in particular circumstances. In that quasi-adjudicatory capacity, the agency cannot permit a collateral attack on a prior judgment. *See, e.g., Puerto Rico Maritime Shipping Auth. v. Federal Maritime Comm’n*, 75 F.3d 63, 66 (1st Cir. 1996); *see also NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 35 (1st Cir. 1987) (NLRB cannot evade effect of prior judgment, even in enforcement action, where dispute was effectively between private parties). As the Federal Circuit has observed, “the same principles of judicial efficiency which justify application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-judicial proceedings.” *Graybill v. United States Postal Serv.*, 782 F.2d 1567, 1571 (Fed. Cir. 1986) (citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981)); *cf. Bath Iron Works*, 125 F.3d at 21 (noting that “federal agency is normally bound to respect findings by another agency acting within its competence” and that “the tendency is plainly in favor of applying collateral estoppel in administrative contexts”). Indeed, the Tenth Circuit – in ruling that the FAA was not bound to respect a prior state-court judgment in the circumstances at issue in *Arapahoe* – noted that the result would have been different if the agency had been acting “as a disinterested adjudicator to resolve a . . . dispute between two outside parties.” 242 F.3d at 1220 n.8; *see also American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 800-01 (5th Cir. 2000).⁶

Furthermore, the payphone providers’ efforts to distinguish *Deerfield* are unavailing. Although that case directly involved the res judicata effect of a federal district court judgment, the federal district court judgment itself depended on the preclusive effect of a state court judgment – of precisely the type at issue here, that is, a judgment rejecting a petition for judicial review of state commission action. The Second Circuit specifically approved the district court’s determination that the state court judgment was entitled to preclusive effect, even though the party mounting a collateral attack on the judgment argued that the state court judgment was preempted by a federal regulation. *See* 992 F.2d at 429 (noting that the federal district court

⁶ Payphone providers argue that the Commission has an independent interest in seeing that its rules are enforced, but that interest is no different from the interest that the Commission has in any case in which two private parties dispute the interpretation of a provision of the Act or a Commission rule. *See, e.g., Deerfield*, 992 F.2d at 426. In the case of disputes over refunds, there is no forward-looking interest in enforcement of the Commission’s rules; rather, there is simply a backward-looking dispute over money.

Mr. Thomas Navin
June 21, 2006
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“was *required* . . . to accord the [state court] judgment the same preclusive effect” as the judgment would have in state court); *id.* (“we see no unfairness” from granting state-court judgment preclusive effect when private party was required to “exhaust his judicial remedies before the agency would step in” because party “had an adequate opportunity to litigate the issue in the state courts”). As the Second Circuit held, the Commission cannot “arrogate to itself the power to (a) review or (b) ignore the judgments of the courts.” *Id.* at 430.

Finally, we note that – *Deerfield* notwithstanding – this Commission ordinarily *does* afford preclusive effect to the judgments of state courts acting within their jurisdiction. For example, in Memorandum Opinion and Order, *Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.; Joint Petition for Expedited Ruling Preempting South Dakota Law*, 17 FCC Rcd 16916 (2002), while the Commission agreed to hear a preemption claim that the South Dakota state court had held to be within “the exclusive jurisdiction of the Federal Communications Commission,” and thus had not decided, *id.* at 16926, ¶ 19 (internal quotation marks omitted), it refused to hear a claim that the South Dakota law was preempted by federal law on tribal sovereignty because “[t]he South Dakota Supreme Court has already rejected Petitioners’ preemption claim with respect to these statutes and federal policies and we see no basis for the Commission to re-litigate these issues.” *id.* at 16932-33, ¶ 36. Likewise, in its Memorandum Opinion and Order, *Broadview Networks, Inc. v. Verizon Telephone Companies and Verizon New York, Inc.*, 19 FCC Rcd 22216 (Enf. Bur. rel. Nov. 10, 2004), the Commission “deferr[ed]” to the conclusions of the New York Supreme Court that the complainant was required to arbitrate its claims because the court had jurisdiction and because “Broadview had an ample opportunity to make its arguments before the New York court.” *Id.* at 22221-22, ¶¶ 14-15.

If I can provide further clarification, please do not hesitate to contact me at (202) 326-7921.

Sincerely,

/s/ Aaron M. Panner
Aaron M. Panner

cc:	Mr. Stockdale	Ms. Carey
	Ms. Preiss	Mr. Bergmann
	Mr. Maher	Mr. Deutchman
	Ms. Arluk	Ms. Griffin
	Ms. Engledow	Ms. Silberthau
		Mr. Killion